SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-793

JOHN OLIVER CHALKER, JR.,

Petitioner,

-v-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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STATEMENT OF THE ISSUES

A.

WHETHER OR NOT THE DOCTRINE AS ANNOUNCED IN THE UNITED STATES v. STETTER, 445 Fed. 2d 472 (5 Cir. 1971), REQUIRING A LOCAL BOARD TO STATE THE REASONS FOR THE DENIAL OF A PRIMA FACIE C.O. CLAIM SHOULD BE APPLIED TO THE DENIAL OF APPELLANT'S CLAIM FOR OCCUPATIONAL CLASSIFICATION (2-A or 2-C) DATED 12-27-67 AND HARDSHIP CLASSIFICATION (3-A) DATED 4-26-68.

B.

WHETHER OR NOT APPELLANT'S LOCAL BOARD ACTED WITHOUT THEIR JURISDICTION UPON HIS REQUEST FOR CONSCIENTIOUS OBJECTOR CLASSIFICATION REQUIRING CANCELLATION OF THE SUBJECT INDUCTION ORDER AND REVERSAL OF THE LOWER COURT'S CONVICTION.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

MISC. NO. _____

JOHN OLIVER CHALKER, JR.,

Petitioner,

-v-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RELIEF REQUESTED

Petitioner, JOHN OLIVER CHALKER, JR., requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit (No. 73-2137) affirming Petitioner's criminal conviction for failure to report for and submit to induction into the Armed Forces of the United States (50 U.S.C. Sec. 462(a)).

JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 U.S.C. 1254(1). Additionally, the order of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Middle District of Florida causes a split among the Circuit Courts upon two essential issues, which are designated "A" and "B" below.

QUESTIONS PRESENTED

Appellant-Defendant, JOHN OLIVER CHALKER, JR., will argue to this Honorable Court the following issues:

A. WHETHER OR NOT THE DOCTRINE AS ANNOUNCED IN THE UNITED STATES v. STETTER, 445 Fed. 2d 472 (5 Cir. 1971), REQUIRING A LOCAL BOARD TO STATE THE REASONS FOR THE DENIAL OF A PRIMA FACIE C. O. CLAIM SHOULD BE APPLIED TO THE DENIAL OF APPELLANT'S CLAIM FOR OCCUPATIONAL CLASSIFICATION (2-A or 2-C) DATED 12-27-67 AND HARDSHIP CLASSIFICATION (3-A) DATED 4-26-68.

B. WHETHER OR NOT APPELLANT'S LOCAL BOARD ACTED WITHOUT THEIR JURISDICTION UPON HIS REQUEST FOR CONSCIENTIOUS OBJECTOR CLASSIFICATION REQUIRING CANCELLATION OF THE SUBJECT INDUCTION ORDER AND REVERSAL OF THE LOWER COURT'S CONVICTION.

HISTORY OF CASE AND TIME WHEN QUESTIONS PRESENTED

Following a plea of not guilty, JOHN OLIVER CHALKER, JR., Appellant-Defendant, was tried and convicted upon a One Count Indictment for failure to report for and submit to induction into the United States Armed Forces (50 U.S. Code Sec. 462(a)). The United States Court of Appeals for the Fifth Circuit Case No. 73-2137, on October 23, 1973, affirmed PER CURIAM, the decision of the lower Court without further opinion upon authority of local rule 21. [U.S. v. Chalker, 337 F. Supp 920 (M.D. Fla, 1972)]. The issues as above stated were initially raised before the Honorable Judge Ben Krentzman, United States District Court for the Middle District of Florida, and again urged in oral argument as well as in Appellant's brief before the Fifth Circuit Court of Appeals.

COMPELLING REASONS RELIED UPON FOR ALLOWANCE OF WRIT

A. The lower Court's holding, which permits a Selective Service local board to deny a requested classification without a statement of the reasons upon which the denial is based, is a deprivation of administrative procedural due process within contemplation of the Fifth Amendment of the United States Constitution. Said procedure prevents meaningful administrative review and requires the judiciary, should judicial review be sought, to guess the basis in fact for the adverse decision and that the Selective Service local board relied upon that basis in fact (See Clay v. U.S., 403 U.S. 698 (June 28, 1971)). The United States Court of Appeals for the Fifth Circuit in U.S. v. Stetter, supra, considered precisely this issue, holding

that a Selective Service local board is required to state the reasons for the denial of a prima facie claim for Conscientious Objector classification. The Fifth Circuit Court of Appeals in the case at bar, refused to extend this doctrine to prima facie request for occupational and hardship classifications. The Third Circuit Court of Appeals in Cale v. Volatile, 465 Fed. 2d 1110 (3 Cir. 1972); U.S. ex rel Bent v. Laird, 453 Fed. 2d 625 (3 Cir. 1971) considered the application of said rule to occupational and hardship classifications, concluding that administrative procedural due process and the facilitation of judicial review mandatorily require a local board state the reasons for a decision adverse to a registrant's claim for occupational and hardship classifications. (See also U.S. v. Strandquist, 5 SSLR 3721 (D. Minn. 1972); U.S. v. Auger, 5 SSLR 3193 (N.D. Cal. 1972)).

B. Appellant-Defendant's claim for Conscientious Objector classification was first submitted after the issuance of an induction order. The lower Court construed this Honorable Court's decision of Ehlert v. U.S., 402 U.S. 99 to exclude said claim from consideration by Appellant-Defendant's Selective Service local board. The critical facts however, demonstrate that Appellant-Defendant's Selective Service local board accepted jurisdiction of said claim, considered said claim upon the merits, denied said claim upon the merits, refused to cancel Appellant-Defendant's outstanding induction order (the one upon which he was convicted) and afford him the only limited administrative procedures available to a Selective Service registrant upon the determination of the merits of any claimed classification. The lower Court concluded that even in this light Ehlert, supra,

precluded local board consideration and would not prejudice Appellant-Defendant upon his claim for Conscientious Objector status within the military.

This issue was presented and rejected by both the First and Third Circuits as well as the United States District Courts for the Districts of New York. U.S. v. Alioto, 469 Fed. 2d 721, (1 Cir. 1972); U.S. v. Shomack, 462 Fed. 2d 330 (3 Cir. 1972); U.S. v. Siskowski, 465 Fed. 2d 48 (3 Cir. 1972); U.S. v. Kovarovic, 6 SSLR 3159 (S.D. N.Y. 1973); U.S. v. Usdin, 6 SSLR 3039 (E.D. N.Y. Dec., 1972).

The case of Musser v. U.S. (9 C.A., 1972) at 42 LW 3082 has been docketed for review to this Honorable Court, which case considers the application of Ehlert, supra, to post induction order C.O. claims where the Selective Service local board acted in an ambiguous nature or considered said claim upon the merits without affording the limited administrative procedural due process available as addressed in Mulloy v. U.S. 398 U.S. 410.

CONCLUSION

For the reasons set forth hereinabove, Appellant-Defendant urges that this Court accept jurisdiction of this cause and grant this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in United

States of America, Plaintiff-Appellee, v. John Oliver Chalker, Jr., Defendant-Appellant, No. 73-2137.

Respectfully submitted,

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Miami, Florida 33155
(305) 264-7200

BY _____
JACK P. ATTIAS, Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing were furnished by air mail, postage prepaid, to the Solicitor General, Justice Department, Washington, D.C., 20530, this _____ day of November, 1973, pursuant to Rule 33, Paragraph 3, of the Rules of the United States Supreme Court.

_____
JACK P. ATTIAS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-2137

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN OLIVER CHALKER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

(October 23, 1973)

Before BROWN, Chief Judge, RONEY and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA, *

Plaintiff, *

vs. * No. 71-152 Cr. T.

JOHN OLIVER CHALKER, JR., *

Defendant *

MEMORANDUM OPINION and ORDER

This is a Selective Service case. The defendant, John Oliver Chalker, is charged in a one count indictment with failure to report to his local board for induction in violation of Title 50, Appendix, U.S.C. § 462 (a). Before the Court is the defendant's "motion raising defenses" filed pursuant to Rule 12 (b) of the Federal Rules of Criminal Procedure. The Court has considered the motion and the memoranda submitted relative thereto.

The facts as evidenced by the defendant's Selective Service file are uncontested. The defendant registered with his local draft board in Lakeland, Florida, in 1962. For some time thereafter he held a series of I-A and II-S (student deferment) classifications. While at school at Chipola Junior College the defendant also worked as a part time spray pilot for S & S Air Service located in Marianna, Florida. In the summer of 1966, the defendant began full time work as a spray pilot and shortly thereafter he received a II-A (occupational deferment) from his local board at the request of S & S Air Service. For some time the defendant's occupation alternated from spray pilot to student and he received deferments in both capacities. In January of 1968 the defendant was classified I-A. The S & S Air Service again requested that the defendant receive an occupational deferment. The local board denied this request and the defendant requested a personal appearance before

the local board. This request was granted. The defendant's classification was re-opened, but on March 11, 1968, the defendant was again classified I-A.

On March 28, 1968, the defendant requested a hardship deferment on the grounds that his father was in poor health and needed his care and support. The defendant's classification was re-opened and the defendant was reclassified I-A. On April 15, the S & S Air Service again requested that the defendant be deferred. The defendant's file was again reopened and the defendant was again classified I-A. The defendant then appealed and the local board's decision was affirmed unanimously.

On October 1, 1968, the defendant requested a hardship deferment on the grounds that "I have married a widow with two children and all three are completely dependent upon me." At the request of the local board, the defendant sent the board additional information which indicated that the wife had independent tax free income of $525 per month.

At this point the National Selective Service Headquarters entered the picture, apparently as a result of an inquiry by United States Congressman Robert Sikes of Florida. After securing some of the information in the defendant's file (but not the information relating to the wife's independent income) the National Headquarters notified the State Director that the defendant might be entitled to a III-A (hardship) deferment. On December 2, 1968, the defendant's request for III-A classification was reviewed and the local board found that the information received did not warrant a re-opening of the defendant's classification. The registrant's file was forwarded to State Headquarters at the latter's request.

WHETHER THE LOCAL AND STATE APPEAL BOARDS LOST JURISDICTION OF THE DEFENDANT BY FAILING TO STATE THE REASONS FOR DENYING DEFENDANT'S REQUESTS FOR II-A, II-C AND III-A CLASSIFICATIONS

The defendant sets forth the broad proposition that draft boards are required to state specific reasons for the denial of a requested classification. A myriad of cases are cited in support of this proposition. It is apparent from a review of those cases that the defendant has construed a rule applying only to conscientious objector cases to be a rule of general application.

Correctly stated, the rule is that whenever a registrant has asserted a prima facie case of conscientious objection, the board must state the grounds upon which the rejection of the claim is based and the reasons in support thereof. The rule was first enunciated in its present form in United States v. Broyles, 423 F.2d 1299 (4 Cir.1970) and it has been adopted by the Fifth Circuit in United States v. Stetter, 445 F.2d 472 (5 Cir.1971). There are, of course, many reasons for the rule. The scope of judicial review in Selective Service cases is limited to the determination of whether or not there was a "basis in fact" for the board's classification of a registrant. 50 U.S.C. App. § 460(b)(3). Because of the inherently subjective nature of conscientious objection, it is virtually impossible in most of those cases to determine whether there was a basis in fact for the board's determination unless the board precisely states its reasons for the denial of the classification.

On the other hand, a determination of whether a registrant is entitled to an occupational or hardship deferment is generally objective in nature. In most cases, courts can readily ascertain the reason for the denial of such a claim (if such reason exists) by an inquiry into the file of the registrant. In such a case, the Broyles rule does not apply and the draft board is not required to

state the precise reasons for its rejection of a registrant's claim.

That is not to say that a draft board can reject a prima facie entitlement to reclassification without reason. There must be ascertainable reasons for the board's rejection of a prima facie claim in order for there to be a "basis in fact" for its determination. Dickinson v. United States., 346 U.S. 389 (1953). However, the defendant does not assert that there were no reasons for the denial of the claims, but only that those reasons were not stated by the board. The mere fact that the local and appeal boards did not give precise reasons for the denial of the defendant's requests for occupational and hardship deferments does not, of itself, divest them of jurisdiction.

THE DEFENDANT'S HARDSHIP CLAIM

A. WHETHER THE LOCAL BOARD LOST JURISDICTION OF THE DEFENDANT BY ITS REFUSAL TO REOPEN THE DEFENDANT'S CLASSIFICATION.

A registrant's classification is to be reopened when the request for reopening is accompanied by facts which, if true, would justify a change in the registrant's classification. 32 C.F.R. § 1625.2. Thus, the board makes the decision of whether or not to reopen. If they reopen, then the board must decide whether the defendant should be reclassified.

Where a registrant presents a prima facie case for reopening of his classification which is based upon factual allegations which are not conclusively refuted by other information in the registrant's file, the refusal of the draft board to reopen the classification constitutes an abuse of the discretion vested in the board. Mulloy v. United States, 398 U.S.410 (1970). Of course, the failure of a draft board to comply with the regulations by which it is governed, will result in its loss of jurisdiction over the registrant and render its orders to that registrant void. Estep v.

United States, 327 U.S. 114 (1946).

The defendant contends that the local board improperly refused to reopen defendant's classification when he requested a hardship deferment after his marriage. The threshold question is whether the defendant presented the board with a prima facie case for reopening his classification. The defendant contends that his allegation that he had "married a widow with two children and all three are completely dependant on (him)," stated a prima facie case for reopening. The defendant's allegation did not state a prima facie claim. It did not assert facts, but merely asserted a conclusion unsupported by facts. Based upon the mere allegation, the board could have made neither a positive or negative decision as to whether to reopen the defendant's classification. Therefore, the board properly requested that the defendant supply it with some facts in support of his claim so that it could make a decision under 32 C.F.R. § 1625.2. When the facts were supplied they revealed that the defendant's wife and children had considerable independent tax free income even if the defendant's wife did not engage in gainful employment. There is no evidence in the file which indicates that the wife could not work. The defendant's claim was based solely upon financial hardship. The facts before the board indicated that the defendant and his wife were actually doing quite well financially and would continue to do so even if he were drafted. Clearly, the defendant's request for reclassification was not accompanied by facts which, if true, would have justified a change in his classification. 32 C.F.R. § 1625.2, Mulloy, supra. Accordingly, the board's refusal to reopen the defendant's classification was entirely proper.

B. WHETHER THERE WAS A DE-FACTO REOPENING OF THE DEFENDANT'S CLASSIFICATION UPON HIS REQUEST FOR HARDSHIP DEFERMENT.

The defendant contends that the local board did, in fact,

re-open his classification for a consideration on the merits upon his request for a hardship deferment mentioned above. When a draft board makes an evaluative determination of the registrant's claim on the merits without formally re-opening the registrant's classification, the draft board improperly deprives the registrant of his right to appeal the decision under 32 C.F.R. 1625.13. Mulloy, supra. However, it is obvious from the language of the regulations themselves that some facts must be considered before a board can determine whether it will re-open the classification. 32 C.F.R. 1625.2. Therefore, the rule in Mulloy only applies where the registrant has made a "prima facie case for reclassification." Mulloy, 398 U.S. at 416. Here, as previously held, the facts presented to the board did not constitute a prima facie case for reclassification. Moreover, the board's consideration of those facts did not constitute a "de facto" re-opening of the defendant's classification, but constituted the mere initial determination of whether a prima facie case for re-opening had been stated. That determination was both proper and mandatory under 32 C.F.R. 1625.2.

C. WHETHER THE LOCAL BOARD IMPROPERLY FAILED TO ADVISE THE DEFENDANT OF THE APPELLATE PROCEDURE AUTHORIZED UNDER 32 C.F.R. § 1627.1 WHEN THE APPEAL BOARD AFFIRMED THE LOCAL BOARD'S DECISION WITHOUT A DISSENTING VOTE.

The defendant was classified I-A on May 6, 1968 by his local board. He appealed to the Appeal Board which unanimously affirmed the local board's decision on August 28, 1968. The defendant concedes that he had no personal right to appeal the unanimous decision on August 28 under 32 C.F.R. § 1627.3. However, the defendant contends that it was error for the board not to inform him of the possibility of appeal under 32 C.F.R.

1627.1. That section provides:

> "(a) When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time."

It is thus apparent that the right to appeal under § 1627.1 belongs to the Director and not to the registrant. It is only necessary that a registrant be informed of his own rights, not those of others.

After the preceding series of requests for deferments was denied, John Oliver Chalker's odyssey through the Selective Service System continued with a notice to report for induction on January 27, 1969. Whereupon, the defendant requested and was granted a transfer of induction from his local board in Lakeland to Marianna, Florida, where the defendant was then residing. Consequently, the date for reporting for induction was postponed by the transfer to February 25, 1969. On February 20, the local board was informed by the State Headquarters that the defendant's wife had written a letter to the President of the United States. The defendant's induction date was again postponed. The letter set out many facts which had previously been before the board and also stated that Mrs. Chalker's previous husband had been killed in a plane crash while in the military. On March 11, 1969, the board found that this information did not warrant a reopening of the defendant's classification. These findings were forwarded to the State Headquarters and the defendant was ordered to report for induction on March 18, 1969.

The defendant failed to report on March 18. On April 17, the defendant was reported as a delinquent and the file was thereafter turned over to the United States Attorney's office. On September 24, 1969, the United States Attorney declined prosecution

for further administrative handling.

The defendant was ordered to report to his local board for induction on November 10, 1969. On November 7, the local board received a letter from the defendant stating that he would not report and requesting a conscientious objector classification. On November 10, 1969, the defendant was sent a Selective Service System form 150 entitled "Special Form for Conscientious Objector," which the defendant completed and returned. On March 30, 1970, the local board informed defendant that the information received did not warrant a reopening of his classification because the board felt the defendant was not sincere in his claim. The defendant's file was forwarded to the State Headquarters at their request. In its letter accompanying defendant's file to State Headquarters, the local board stated: "The board feels that the registrant has effectively evaded the draft by his concerted efforts to avoid induction during his draft age years." Shortly thereafter, the case was again referred to the United States Attorney's office and this prosecution was instituted.

THE CONSCIENTIOUS OBJECTOR CLAIM

The defendant contends that the local board committed numerous errors in its handling of the defendant's conscientious objector claim which consequently deprived the board of jurisdiction and rendered its order to report for induction void.

The defendant sets forth three contentions the merit of which all depend upon whether the defendant's request for reclassification stated a prima facie case. These contentions are: 1) That the local board improperly refused to reopen the defendant's classification; 2) That the local board in fact did reopen the defendant's classification in a de facto manner, thereby improperly denying defendant his right to appeal; and 3) That the local board failed to give any valid reasons for its refusal to reopen the defendant's classification.

The defendant did not request reclassification as a conscientious objector until after he had received his notice to report for induction. 32 C.F.R. 1625.2 (b) provides in part:

> ". . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction. . .unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The scope of what constitutes a prima facie case for reclassification after the registrant has received his order to report for induction is limited. In order for there to be a prima facie case at such a late date, the status of the registrant must have been changed by circumstances beyond his control.

It is clear from facts submitted by the defendant himself that whatever conscientious objections he may have possessed crystallized some time prior to the issuance of his draft notice. The defendant's statements indicate that his conscientious objections had crystallized while he was in college as a result of his association with several of his professors. The defendant had not been in college for almost two years when he received his notice to report. In such a case the registrant's status was not changed by "circumstances beyond his control." United States v. Adams, 449 F.2d 122 (5 Cir.1971). Accordingly, the defendant established no prima facie entitlement to conscientious objector status. Consequently, the defendant's argument asserting procedural errors in the handling of his request for reclassification is totally without merit under the doctrines enunciated in Mulloy, supra and Stetter, supra.*

* It should be noted that the local board did, nevertheless, give a "reason" for the denial of the defendant's claim, i.e., insincerity. That reason would be sufficient under the Broyles and Stetter rules in light of the abundance of evidence in the defendant's file which tends to support that finding.

Moreover, the decision of the Supreme Court in Ehlert v. United States, 402 U.S. 99 (1971), indicates that the local board need not have considered the defendant's request for a conscientious objector classification even if his beliefs had crystallized after his induction order was issued. See also, United States v. Adams, supra.

The order issued by the local board on October 31, 1969, directing the defendant to report for induction on November 10, 1969, was valid.

ACCORDINGLY, it is

ORDERED and ADJUDGED:

1. The foregoing shall constitute findings of fact and conclusions of law.

2. The defendant's "motion raising defenses" filed pursuant to Rule 12 (b) of the Federal Rules of Criminal Procedure, is hereby DENIED.

3. The Clerk of the Court is directed to set this case for trial.

DONE and ORDERED this 4 day of ~~January~~ February, 1972.

BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA, *

Plaintiff, *

vs. * No. 71-152 Cr. T.

JOHN OLIVER CHALKER, JR., *

Defendant. *

ORDER

This came before the Court upon defendant's motion for a rehearing of the defendant's motion raising defenses. The Court denied the defendant's motion raising defenses by its order of February 4, 1972. The crux of the defendant's motion for rehearing involves the issue of whether the "reasons for decision" rule of the case of United States v. Broyles, 423 F. 2d 1299 (4 Cir. 1970), which has been adopted in this circuit in United States v. Stetter, 445 F.2d 472 (5 Cir. 1971) is one of general or limited application.

It is the defendant's contention that the Broyles rule is one of general application. That may well be true under the new Selective Service Regulations §§ 1623.4(c), 1624.6 and 1626.24(i). However, under the regulations in effect at the time the defendant was classified, a statement of reasons for the denial of a requested classification was required only where the registrant had asserted a prima facie case of conscientious objection.

Defendant cites in support of his position the case of United States v. Reese, 331 F. Supp.1088 (N.D.Ga.1971), which interpreted Clay v. United States, 403 U.S.698 (1971) to require that a local board must give a statement of reasons in denying a conscientious objector classification even where the registrant had not set out a prima facie claim. Whether that is a correct

statement of the law in light of Clay is irrelevant here. Both Clay and Reese were limited to cases of conscientious objection. Those cases do not support the defendant's position that a statement of reasons was required when his draft board denied his requests for II-A, II-C and III-A classifications. As to the defendant's conscientious objector claims, even if it is assumed that the holding in Reese is correct and that the reasons given the defendant for the denial of his conscientious objector claim were inadequate, Ehlert v. United States, 402 U.S.99 (1971) would still control the case at bar. That case indicates that the local board need not have considered the defendant's request for a conscientious objector classification even if his beliefs had crystallized after his induction order was issued. Accordingly, it is

ORDERED:

Defendant's motion for rehearing and oral argument is hereby DENIED.

DONE and ORDERED at Tampa, Florida, this 30 day of March, 1972.

BEN KRENTZMAN

BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA, *

Plaintiff, *

vs. * No. 71-152 Cr. T. K

JOHN OLIVER CHALKER, JR., *

Defendant *

*

ORDER

Once again this Court is requested to reconsider its previous order denying the defendant's motion raising defenses. It should be noted that upon each occasion that such request has been made, the Court has, in fact, reviewed the file in this case, reviewed its prior orders and opinions and reviewed the memoranda and cases cited by the parties herein. Therefore, each time the defendant hasmoved for "re-hearing", that motion has, as a practical matter, been granted. But on each occasion the Court has determined, upon a full review of this case as mentioned above, that the Court's order of February 4, 1972, should not be changed.

Upon this occasion, the defendant cites the cases of Cale v. Volitile, 5 S.S.L.R. 3717 (3rd Cir.1972) and United States v. Strandquist, 5 S.S.L.R. 3721 (D.Minn.1972) in support of his continuing argment that the "reasons for decision" rule of United States v. Broyles, 423 F.2d 1299 (4 Cir.1970) which has been adopted in this circuit in United States v. Stetter, 445 F.2d 472 (5 Cir.1971) is a rule of general application.

The defendant contends that a statement of reasons should have been given for the denial of his requests for a classification of II-A or II-C dated December 27, 1967, and request for III-A classification dated March 28, 1968. The defendant has

cited several cases which have applied the "reasons for decision" rule on a general basis. As mentioned in the Court's February 4, 1972 opinion, this Circuit has not extended the rule beyond those cases where a registrant asserts a prima facie case of conscientious objection. Stotter, supra. On the other hand, this Circuit has not precluded such an extension.

This Court in its February 4 opinion indicated why the "reasons for decision rule" should not be one of general application. After considering the cases cited by the defendant, the Court is not persuaded that it should change its opinion.

Accordingly, defendant's motion raising defenses is again denied.

DONE and ORDERED at Tampa, Florida, this 4 day of December, 1972.

Ben Krentzman

BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

COURT, U. S
APR 12 1974

No. 73-793

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN OLIVER CHALKER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-793

JOHN OLIVER CHALKER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that his conviction for failure to report for induction should be reversed because his local Selective Service board refused to consider his post-induction-notice conscientious objector claim, and because the board failed to state its reasons for denying his requests for occupational and hardship deferments.

After the district court entered an opinion denying his pretrial motions (337 F. Supp. 928; Pet. App. 8), petitioner was convicted in a jury-waived trial in the United States District Court for the Middle District of Florida on one count of failing to report for induction into the armed forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to imprisonment for eighteen months, all but ten days of which was suspended, and to a two year period of supervised probation. The court of appeals affirmed without opinion (Pet. App. 7).

The facts, which are uncontested, are summarized in the opinion of the district court (Pet. App. 8-17). In relevant part, they indicate that after registration with his local draft board, petitioner held various deferments through 1967. Shortly before petitioner's student deferment expired on his twenty-fourth birthday, he asked for a II-A or II-C deferment based on his employment as a spray pilot (C.A. App. 55-58),[1] but was classified I-A on January 8, 1968, when he became 24 (C.A. App. 62).

The board then received a letter from his employer supporting his request for occupational deferment, following which it reclassified him I-A and granted him a hearing, after which he was again classified I-A (C.A. App. 62). He was informed of this classification on March 14, 1968; on March 28, 1968, he requested a hardship deferment based on a statement that his father was ill, in which he indicated that he was leaving his job and returning home "to help when and where I'm needed" (C.A. App. 67). He was again reclassified I-A; on April 10 he wrote the board indicating that he had decided to remain at his job and asking that his case be sent to the appeal board (C.A. App. 70). His employer again requested an occupational deferment for him, but he was again classified I-A. The file was then transmitted to the appeal board, which, on August 28, 1968, unanimously reclassified him I-A (C.A. App. 72). No statements of reasons for the classifications were given either by the local board or the appeal board. On September 25, 1968, petitioner was ordered to report

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[1] "Tr." designates the transcript of the trial in the District Court; "C.A. App." refers to the Appendix filed in the court of appeals. Copies of both documents are being lodged with the Clerk of this Court.

for a pre-induction physical. Thereupon, on October 1, 1968, petitioner once again requested a hardship deferment, based this time on the fact that he had married a widow with two children. Material in his file, however, indicated that his wife would receive $295 monthly in insurance payments until December 1969; furthermore, her two children received $230 monthly in social security payments. On December 2, 1968, petitioner's request for a hardship deferment was reviewed and the local board found that the information received did not warrant a re-opening of petitioner's classification.[2]

On December 27, 1968, petitioner was ordered to report for induction on January 27, 1969 (Tr. 17). He did not appear, but he did file a request for transfer of induction to his current residence on January 27. The request for transfer was granted, and he was again ordered to report for induction on March 18, 1969. When petitioner did not report on that date, he was reported to the United States Attorney as a selective service violator. The United States Attorney declined prosecution at that time and requested that additional efforts be made through the Selective Service System to secure compliance by petitioner with his obligations (Tr. 17-18). On October 31, 1969, petitioner was ordered to report for induction on November 10, 1969 (Tr. 18).

On November 7, 1969, for the first time, petitioner submitted a request for classification as a conscientious objector (C.A. App. 17-18, Tr. 18-19). On December 9, 1969, petitioner submitted Form 150, a special form for conscientious objectors (C.A. App. 10-26), together with

[2] Although this was the hardship claim urged most strenuously below (Pet. App. 11-12, 20), petitioner does not here challenge this action.

a number of letters from various people indicating that petitioner had been known to hold pacifist views for at least three or four years previously (C.A. App. 27-32).[3] On March 30, 1970, petitioner was notified by letter from his local board that his claim for conscientious objector status had been denied. The board said that "the information submitted did not warrant reopening your classification and the board felt you were insincere in your claim" (C.A. App. 14-15). Petitioner was indicted for his refusal on November 10, 1969, to submit to induction.

Petitioner contends that his induction order was invalid because the local and appeal boards failed to give him a statement of their reasons for denying his claims for occupational and hardship deferments. He also contends that the local board improperly denied his post-induction-notice conscientious objection claim without reopening.

1. We believe that the board properly refused to reopen his classification to consider his conscientious objection claim, which the record indicated had crystallized before the receipt of his induction notice. Since 32 C.F.R. (1969 ed.) 1625.2 precludes re-opening after the mailing of an induction notice, unless the board finds there has been a change in the registrant's status resulting from circumstances over which registrant has no control, the board could not, on the facts of this case, properly have re-opened when petitioner submitted his Form 150.

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[3] These statements conflicted with a letter petitioner had written to his local board on December 25, 1967, in which he stated that he had "tried to fly for the military" but could not meet their physical standards due to his poor eyesight (C.A. App. 55-58).

The board's action was proper even if it be assumed, contrary to the letters in support of his claim, that petitioner's objection crystallized after receipt of his induction notice, since, in that case, petitioner would be limited to his post-induction remedies. See *Ehlert* v. *United States*, 402 U.S. 99, 104. Any possible ambiguity in the board's action tending to indicate that it considered petitioner's claim on the merits would not affect petitioner's rights. The board simply had no power to consider his post-induction order conscientious objection claim. See *Musser* v. *United States*, 414 U.S. 31.

2. Petitioner also contends that the failure of the boards to provide statements of reasons for denying his claims for an occupational deferment and his first hardship claim rendered his induction order invalid. But petitioner in effect abandoned his first hardship claim in his letter of April 10, 1968, in which he stated that he had decided to remain at his job, rather than returning home to take care of his father. Petitioner by this action demonstrated that the board had correctly concluded that petitioner's hardship claim was invalid, since his father's condition did not require his presence. Under these circumstances, it would be particularly inappropriate to hold that the board's failure to enunciate the reasons for its correct conclusion forever excused petitioner from all further obligations to submit to induction. Cf. brief for the United States in *Davis* v. *United States*, No 72-1454, pp 22-24.[4]

Petitioner urged his claim for an occupational deferment more seriously; it was considered and rejected by the local board three times, and unanimously rejected by the appeal board. These bodies thus concluded that petitioner

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[4] A copy of this brief is being sent to petitioner's counsel.

would better serve the national interest in the armed forces than in his civilian occupation. This decision, turning as it does on an evaluation of national needs, is significantly different from decisions concerning conscientious objection, or even hardship, which turn on the personal needs of the registrant. Therefore, we submit, when the board acts within its discretion in denying a claim for an occupational deferment, the registrant is not justified in refusing induction, since no personal rights of his have been violated.

The courts below concluded that the rule that a local board must state reasons for its classification decision when a *prima facie* case for a conscientious objector exemption has been presented, and that its failure to do so will vitiate a subsequent induction order, should not be extended to hardship and occupational deferment claims. The district court contrasted the "inherently subjective nature of conscientious objection" with the "generally objective" nature of occupational or hardship claims. It therefore concluded that, in the latter categories of cases, "courts can readily ascertain the reason for the denial of such a claim (if such reason exists) by an inquiry into the file of the registrant," so the board need not state its reasons (Pet. App. 10-11). The court of appeals affirmed without opinion (Pet. App. 7).

This conclusion is inconsistent with the view of the Third Circuit, which has extended the requirement for a statement of reasons to hardship and occupational deferment claims. See *United States ex rel Bent* v. *Laird*, 453 F.2d 625 (C.A. 3) (hardship deferment) and *Cale* v. *Volatile*, 465 F.2d 1110 (C.A. 3) (occupational deferment). See also *United States* v. *Strandquist*, 345 F. Supp. 217 (D. Minn.) (occupational deferment); *United States* v. *Auger*, 337 F. Supp. 342 (N.D. Calif.) (hardship deferment).

As noted above, we do not believe that it is necessary in this case to consider whether the statement of reasons requirement should extend beyond conscientious objection claims. However, if that issue is reached, we submit that the conclusion of the district court is correct, for the reasons stated therein. This issue does not in any event merit plenary review by this Court, since the Military Selective Service Act was amended in 1971 to require a statement of reasons at the registrant's request for an adverse decision on any of his claims. 50 U.S.C. App. (Supp. II) 471a(b)(4). Any inconsistency between the decisions of the Third Circuit and the decisions below therefore affects only a limited number of pre-1971 cases.

The petition for a writ of certiorari should therefore be denied. Alternatively, if this Court believes it necessary to decide, in the context of this case, whether local boards must state reasons for their denial of *prima facie* valid hardship and occupational deferment claims, the petition for a writ of certiorari should be granted and the decision summarily affirmed.

Respectfully submitted.

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Solicitor General.

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